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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 433.

WILLIAM E. LAMB, *Petitioner*,

vs.

WILLIAM A. SCHMITT, Receiver, *Respondent*.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

This case presents the single issue whether, on the record itself there is any reason for refusing to apply the well settled rule that a non-resident present in the jurisdiction solely as a party and/or attorney in a pending suit, is immune from service of process.

The Respondent admits that the case comes within the scope of the general rule. He claims, however, that an exception should be made because of the "circumstances". These "surrounding circumstances" he blandly plucks out of the atmosphere.

Analysis of Record and Corrections of Respondent's Statements of Fact.

This makes it necessary to come back firmly to the *record*. The record on the motion to quash consisted of:

(1) Bill in the present case No. 162.

(2) Bill and amended bill in creditor's suit, case No. 129.

(3) Final decree in creditor's suit.

(4) Answer of Lamb to citation for contempt in case No. 129.

(5) Certain affidavits and testimony.

Respondent does not make it clear how the "circumstances" he relates give rise to an exception which has never been recognized by any court or text writer. But passing that, the existence of these "circumstances" is pure assumption on the part of Respondent. The *evidence in the record* does not prove any of them and they are not admitted by Lamb.

Respondent finds his "circumstances"

(1) in the allegations of the bill in the present case and the allegations of the bill in the creditor's suit.

(2) in the provisions of the final decree in the creditor's suit.

Neither of these is evidence against Lamb.

(1) It is elementary that a motion to quash does not operate as a demurrer and that the allegations of the bill are *not* admitted by such motion. Compare *Meisukas v. Greenough Red Ash Coal Co.*, 244 U. S. 54. Respondent, however, has throughout his argument assumed that the facts alleged and conclusions of law set forth in the present bill, which would be of course the ultimate questions on the merits, were con-

ceded by Lamb in his motion to quash. (Respondent's Brief, pp. 6, 12, 33) Respondent repeatedly asserts that:

> "The said motion did not and could not attempt *to deny* the facts set forth in the original bill." (Brief, p. 6)
>
> "There is not one single sentence in either of these pleadings [the motion and affidavit] *which attempts* to deny the allegations of the bill in No. 162, [the present suit] or which attempts to extenuate the taking of the money, or which alleges that the money was received out of the state." (Brief, p. 12) See also Brief, p. 32-33.

On this basis, Respondent contends, and the Circuit Court of Appeals apparently assumed, that on the hearing of the motion to quash service, it was established against Lamb that the property received by him was impressed with an equitable lien in favor of the creditors; that such property was in the constructive possession of the court, "*in gremio legis*", and that Lamb was obligated to return it. Petitioner respectfully submits that none of these matters had been determined, but, on the contrary, their determination against Lamb was the very purpose of the present suit. In short, Respondent is asking this Court, on a motion to quash, to assume the truth of every allegation in the complaint. Were this contention valid, any allegation in a bill of complaint concerning citizenship, presence, "doing business", etc., would, even in the face of affidavits showing lack of jurisdiction, necessarily have to be taken as true for the very purpose of determining the existence of such jurisdiction. No case has been cited for such an extraordinary proposition, and we do not believe it to be the law.

(2) Nor can the consent decree in the creditor's suit No. 129 be resorted to as evidence of any fact whatever. As against Lamb its allegations are not evidence and cannot be taken as true. Respondent himself caused to be filed an affidavit (R. p. 140) of one of his attorneys which recites that the decree was the result of negotiations in which Lamb had no part. Mr. Cook's affidavit recites that:

> "* * * conference was called for the purpose of negotiating a settlement * * * (R. 141) William E. Lamb was not present at any of said conferences and, so far as affiant had knowledge, he did not participate therein in any way * * * finally a tentative agreement was reached between counsel representing the plaintiff and interveners and counsel representing Mrs. Holland (with the exception of William E. Lamb) * * * (R. 142) the said William E. Lamb stated to affiant that he was out of the case and had nothing to do with the case at that time, that his services had been dispensed with" (R. 144).

When the draft of decree thus agreed upon was presented to the court,

> "* * * the presiding Judge * * * inquired if it was or was not a consent decree and, upon being informed that it was, said presiding Judge immediately signed said decree * * *. When affiant presented the final decree for the approval of said Lamb, he was requested by said Lamb to insert in said decree a provision that same should be without prejudice to him or Butler, Lamb, Foster & Pope. * * * This was agreed to (subject to the approval of his associates) by affiant, and the said provision was inserted in said decree, on the request of said Lamb by con-

> sent of all attorneys there present representing the plaintiff and interveners." (R. 144-145)

The foregoing analysis shows that the allegations of the two bills in equity and the provisions in the consent decree cannot be regarded as *evidence*. The remainder of the record consisted of Lamb's motion to quash and accompanying affidavit, his answer to the citation for contempt, two affidavits filed by Respondent and the oral testimony of Respondent's attorney. Petitioner's affidavit set forth simply Lamb's residence and the reason for his presence in Mississippi. The facts stated by Lamb on these points are conceded by Respondent to be true (Respondent's Brief, p. 6), and, in the latter's own words show:

> "That the petitioner was a non-resident attorney attending court in a foreign jurisdiction at the time of the service of the writ upon him; that he was also at the time * * * under process as a party." (Respondent's Brief, p. 7).

The answer to the contempt citation admitted merely that Lamb had received payment, detailed the services he had rendered, and explained the circumstances attending such payment. It clearly did not admit the allegations or conclusions of either the original creditor's bill, or of the present complaint.[1] The two affidavits, filed by Respondent, indicated that Lamb had expressly been excluded from the operation of the consent decree, in view of the then pending contempt proceeding (R. 140-145); and that he had received the payments (R. 145-147), a

[1] The petition and citation for contempt were attached to the motion to quash in order to show that Lamb was present as a party (R. 99). The allegations in neither were admitted.

fact never denied. The testimony of Respondent's attorney showed that the hearing on the contempt charge had been continued. (R. 153)

Such was the evidence, and the only evidence on which the District Court acted in considering whether the plea of immunity should be sustained, and such is the evidence before this Court on review. It showed merely that in a creditors' suit against Lamb's client, Mrs. Holland, a consent decree had been entered almost two years after the filing of the bill; that long prior to such decree Lamb had been paid for his services by Mrs. Holland; that a citation for contempt for accepting such payment had been issued against him and that he had answered the citation, a hearing on which had been continued; that while attending court as an attorney in the creditor's suit and/or party defendant to the contempt charge, he had been served with process in a suit by the Receiver appointed by the terms of the consent decree; that the complaint in such suit *alleged* that the monies received by him in payment had been subject to an equitable lien in favor of Mr. Holland's creditors; and, finally, that Lamb asserted his immunity from process.

Nevertheless, Respondent, in purporting to set forth the evidence, and in his arguments thereon (Brief, pp. 7-10), first states the allegations of the original creditor's bill and the terms of the consent decree, as though such matters were admitted by the motion to quash. We have already shown that such statements have not been admitted, but are strongly controverted in the present suit, and that the consent decree is not binding upon Lamb.

We discover finally that the only respect in which

this case differs from cases such as *Stewart v. Ramsay*, 242 U. S. 128, and *Page Co. v. Macdonald*, 261 U. S. 446, where this Court has approved the rule of immunity, is that it is a suit by a Receiver. Whether or not the suit is well founded, whether there was any trust fund, whether the fees paid Lamb came from the trust fund, whether the monies were paid within the jurisdiction of the court, whether the funds in question ever were within the jurisdiction of the court—all these questions must await a trial on the merits. They are not proved as against Lamb and are not admitted by him. And therefore they cannot be assumed in an inquiry into the propriety of quashing the summons. There is nothing in the *record* that bears upon *that* question except the bare fact that this is a suit on a chose in action by a Receiver.

There is another misconception to be corrected.

Respondent, in his present brief states as a fact, that Lamb was a party to the creditor's suit. This is based upon the theory that the citation for contempt and Lamb's reply thereto, amounted to a submission to the jurisdiction of the Court as a party in the original creditor's suit. Of course Lamb was a defendant in the contempt proceeding; but whether or not he had become a party to the original creditor's suit is the very question now awaiting determination by this Court in the companion case No. 432.

Certain inaccuracies may also be noted. Respondent refers (p. 9), again on the basis of mere allegations in the bill, to the intervention of the creditor banks holding in excess of $7,000,000 of judgments, as though such intervention had been pending when

Lamb received the payments for his services. Such interventions were not filed until April 17, 1930, after all payments to Lamb had been made. (R. 6, 79) Until they had intervened, these creditors could not possibly claim any lien upon or beneficial interest in Mrs. Holland's property.

Respondent's brief further states (pp. 9, 35), on the basis of mere allegations, that the Government intervention was pending throughout the entire suit. This intervention was dismissed on April 19, 1930, by order of the court on appliction of the Government, eleven days before the final consent decree. Therefore, since this Government claim was never brought to a successful conclusion, no equitable lien can even be alleged to have ever existed.

Thus Respondent does not deny the essential facts upon which the claim to immunity is founded, but on the basis of matters never proved and never admitted, and which could not properly be considered on the question of immunity, builds his argument that an exception should be created to the general rule of immunity. With the actual facts presented by the record clearly in mind, we may consider and reply briefly to each of his contentions.

RESPONDENT'S ARGUMENT.

As we have stated, the single issue is whether this record contains facts (as distinguished from mere averments) which should prevent a court from applying an established rule of law. For the reasons underlying the rule of immunity and the authorities in support, we refer to our main brief. Respondent's argument that an exception must be carved out in the present case consists of nine contentions which we

may briefly consider in turn. It is submitted that none of them alone, or any of them collectively, offer a cogent reason for denying immunity

REPLY TO RESPONDENT'S POINTS I AND II.

Innumerable authorities are cited for the propositions that the filing of a creditor's suit creates an equitable lien upon the defendant's property, which lien is binding upon all transferees and that the doctrine of *lis pendens* applies to all takers *pendente lite.*[2] Petitioner does not deny, nor need we discuss, the validity of either of these propositions. Petitioner submits that neither of them is involved in a consideration of the question whether the rule of immunity is to be applied. Whether such an equitable lien existed, whether Lamb received his fees subject to it, whether he must return them—all depend upon the proof of the allegations of the bill, which have not been proved, or admitted.[3] Moreover, Lamb was expressly not bound by the consent decree in the creditor's suit.

Respondent vaguely contends that immunity must be denied because the property received by Lamb was *in gremio legis.* But this again assumes that all the allegations of the two bills are true. There is no *evidence* that the moneys paid Lamb were ever *in gremio legis.* Clearly, such property could not be *in*

[2] Of course, under the law of Mississippi, as Respondent himself points out (p. 13), the doctrine of *lis pendens* has nothing to do with the possible equitable lien created by filing a creditor's bill. See *Fernwood Lumber Co. v. Meehan-Rounds Lumber Co.*, 85 Miss. 54, cited on p. 13 of Respondents' brief.

[3] Indeed, there is considerable doubt whether, because of defects in the original creditor's bill, any equitable lien could have arisen, and thus the bill itself probably fails to state a cause of action. See Petitioner's Reply Brief in No. 432, pp. 13-15. This of course is immaterial in determining whether immunity from service exists.

gremio legis unless it was at least subject to an equitable lien. Even if the allegations and conclusions of the present bill were admitted to be true, they were insufficient to establish an equitable lien. For under the law of Mississippi the filing of a creditor's bill does not create an equitable lien unless the property upon which it is to exist is specifically described in the bill. As we have pointed out, the original creditor's bill not only failed specifically to describe the property of Mrs. Holland, but admitted that much of it was unknown. Moreover, such equitable lien is established only when the suit is brought to a successful conclusion and only against parties bound by the decree. Lamb was expressly not bound by the consent decree in the creditor's suit. Thus even had there been a sufficient description to warrant an equitable lien, such lien has never been established as against Lamb.

REPLY TO RESPONDENT'S POINTS III AND IV.

Respondent insists that the present suit is ancillary or "auxiliary" to the original creditor's suit. The term can be applied to a good many different kinds of proceedings. In the present case all that it means is that a Receiver appointed in suit No. 129 is suing to collect a chose in action—one of the assets of his estate. This bare fact—that it is a Receiver that is plaintiff—should not cause all rules as to service of process to be dispensed with. See *Pacific Railroad v. Missouri Pacific Railway Company*, 3 Fed. 772; and see our main brief, page 9.

Respondent discusses the cases cited by the District Court on the proposition that although for purposes of federal jurisdiction the present suit is an-

cillary, it is independent in the sense that the defendant must be brought before the court in regular fashion, and consequently the rule of immunity is fully applicable. There is little point in again digesting these cases, and we refer to our main brief (p. 9), and to the opinion of the District Court. (R. 159) It should be noted, however, that Respondent's contention is in effect an argument that merely because it is a Receiver that is plaintiff, a court, by an *ipse dixit*, automatically acquires jurisdiction over any new parties, resident or non-resident.

REPLY TO RESPONDENT'S POINT V.

Respondent again cites innumerable cases concerning the conflicting jurisdiction of state and federal courts, mainly in receivership cases, in an apparent endeavor to show that Lamb having taken property in the constructive possession, "*in gremio legis*," of a court in Mississippi, that court, rather than any other court, should determine the present controversy, and that therefore all established rules of immunity should be abandoned.

There is no need to discuss these authorities, for Respondent's argument does not rest upon the record. As we have shown (Points I and II), the existence of an equitable lien depends upon the Respondent being successful in the present suit. As we have likewise shown, Respondent's contention that there was an equitable lien is predicated upon the false assumption that Lamb by his motion to quash the *service* admitted the truth of the allegations in the bill, or that he was bound by the consent decree. Moreover, even assuming that an equitable lien did exist, this does not mean that the property was in the *possession*

of the court, in the same sense as property held by a Receiver. The Receiver in the creditor's suit here was not appointed until long after the payments to Lamb had been made. The question in the present case is whether immunity must be denied, and Petitioner submits that on this record, the considerations determining the retention or surrender of property by courts of concurrent jurisdiction are wholly irrelevant.

Further it is not true that there is an imperative requirement that the court appointing a receiver should handle all litigation the receiver may inaugurate. A receiver frequently sues in a court other than the one appointing him. In fact by the very order appointing Mr. Schmitt a receiver in cause 129 he was "invested with full power and authority to institute and/or prosecute *in any Court* of proper jurisdiction at law or in equity any suit," etc. (R. p. 92).

REPLY TO RESPONDENT'S POINT VI.

In this section Respondent cites the cases supporting the general rule of immunity but argues "that the claim of privilege is entirely dependent upon the circumstances surrounding the litigation." We agree that when the circumstances are such as to enable a party to invoke the well established rule, he may do so. The mere statement of the rule does not aid Respondent in his endeavor to show that the present record presents circumstances which should make the rule inapplicable.

REPLY TO RESPONDENT'S POINT VII.

Respondent's contention in this portion of his brief appears to be that the rule of immunity, the social

desirability of which he fully concedes, should not be applicable (1) where property in possession of the court, *"in gremio legis"*, is involved in the suit, and (2) where the defendant is an attorney.

1. As to the first of these, it is of course predicated upon his earlier argument that Lamb took property subject to an equitable lien. As we have shown, this argument rests upon the assumption that the facts alleged in the various bills were admitted. This is not the fact on the present record. On the contrary, as we have shown the determination of whether or not such lien existed is the very object of the present suit.

2. As to the second branch of Respondent's contention, that an attorney for a party "by his very presence in court * * * has submitted himself to the jurisdiction" (Brief, p. 26), we can say only that if this were true, there would be no rule of immunity. An attorney is not, as Respondent insists, the "alter ego of the client" or "in fact a privy or practical party to the suit" (Brief, p. 26) in every case in which he appears. The mere statement of the argument is sufficient answer. Moreover, Lamb, when served, was in the jurisdiction not only as an attorney but also as party defendant in the contempt proceeding, and as a party his immunity is unquestioned.

Respondent has cited a number of cases to "illustrate the idea" advanced. Two of these, *Nichols v. Horton*, 14 Fed. 327, and *Iron Dyke Copper Mining Co. v. Iron Dyke Railroad Co.*, 132 Fed. 208, were early federal cases decided long before *Page v. Macdonald*, 261 U. S. 446, established the rule of immunity for the federal courts. Moreover, in the *Iron Dyke* case, the defendants had voluntarily come into the jurisdiction as *plaintiffs* to bring suit as part of a

general conspiracy. In the present case, Lamb was in the jurisdiction as a party defendant and as attorney for a party defendant. See *Read v. Neff*, 207 Fed. 890. In each of the state cases cited, the party claiming immunity had likewise voluntarily come into the jurisdiction for the purpose of suing a resident. Moreover, in some of these states, the general rule of immunity is not recognized. In *First National Bank v. Di Martino*, 180 App. Div. 250, 168 N. Y. Supp. 310, cited by Respondent, the asserted immunity was granted.

REPLY TO RESPONDENT'S POINT VIII.

Respondent attempts, in some fashion not clear to Petitioner, to argue that the claimed immunity should have been asserted "by special plea" rather than by a special appearance and motion to quash. Whatever this contention may be, it appears to be conclusively answered by the very case of *Meisukas v. Greenough Red Ash Coal Co.*, 244 U. S. 54, which Respondent cites, and in which this Court squarely held that the proper mode of attacking service of process was by a motion to quash. See also *Pine Hill Coal Co. v. Gusicki*, 261 Fed. 974; *Joseph Frackman Co. v. Lloyd's London, Inc.*, 7 Fed. (2nd) 620; *Creager v. P. F. Collier & Son Co.*, 36 Fed. (2nd) 781; *Hurley v. Wells-Newton National Corp.*, 49 Fed. (2nd) 914, 918.

Finally, Respondent concludes with a reiteration of the confused and mistaken assumptions made at the outset. He states variously: (1) that there was before the court "the decree showing the holding of the court that the money was trust funds." (Page 32) There was no such decree binding on Lamb. (2)

That "the facts were all admitted." But as we have shown this could not mean that the allegations of the bill, the ultimate question in the present suit, were admitted by the motion to quash. That this assumption underlies all of Respondent's arguments, appears from his summary, which, although quite contradictory in itself, we think should be quoted:

> "* * * *On the motion to quash, the facts stated in the pleadings would,* under ordinary circumstances, *be taken as true,* but this assumption was not necessary in this case since *the facts themselves were in evidence* before the lower court and it was only necessary that it should say whether the rule of personal privilege of an attorney or party under process attending court was inflexible to such an extent that if while acting as attorney *and attending court, he should, pendente lite, take a portion of the subject matter of the litigation, the parties to the cause must be referred to the court of the residence of such attorney.*" (Brief, p. 33)

REPLY TO RESPONDENT'S POINT IX.

Respondent here attempts to explain *Page v. Macdonald, supra.* In that case this Court held that, on a motion to quash, the allegations of the complaint could not be taken as true for the purpose of destroying the immunity of a non-resident. Respondent tries to explain that decision by saying:

> "We suggest that it was meant by that statement that on a motion to quash sufficient evidence should be introduced before the Court to show that there was a serious question of fact involved which would, if true, in effect destroy the claim to privilege." (Brief, p. 34)

This explanation of *Page v. Macdonald* is derived entirely from the imagination of the Respondent. There is nothing in the case itself to justify it. Nor does Respondent point out in what respect the "evidence" in the present case is any more ample than it was in *Page v. Macdonald*.

In conclusion, Petitioner submits that the instant case, stripped of its surplusage, presents merely a suit for the return of money, founded upon the alleged existence of an equitable lien, brought against a non-resident defendant upon whom service was made while he was within the jurisdiction attending court both as an attorney and a party defendant in other causes. Upon a proper motion, the District Court quashed such service in accordance with the rule established by this Court. Such action was eminently proper, and the decision of the Circuit Court of Appeals reversing the order was erroneous.

Respectfully submitted,

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